

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

I. INTRODUCTION

1 **II. BACKGROUND**

2 Plaintiffs filed this action in California state court on July
3 26, 2010, seeking rescission of a mortgage loan transaction due to
4 alleged violations of the Truth in Lending Act by Defendant, as
5 well as declaratory and injunctive relief. See ECF No. 1 Ex. A
6 ("Compl."). Defendant was served with the state court complaint on
7 July 28, 2010, and on August 30, 2010, Defendant removed the action
8 to federal court, citing 28 U.S.C. §§ 1331 and 1332 as bases for
9 this Court's jurisdiction. See ECF No. 1 ("Notice of Removal") at
10 1-2. On September 3, 2010, Defendant filed its MTD.

11 On September 13, 2010, the parties stipulated to, and the
12 Court approved, a continuance of the hearing on Defendant's MTD.
13 ECF No. 7 ("Sept. 13, 2010 Stip. and Order"). The parties claimed
14 that this continuance was necessary to accommodate ongoing
15 settlement discussions. Id. The hearing, originally set for
16 October 8, 2010, was continued to November 15, 2010. Id.

17 Because Civil Local Rule 7-3 requires an opposition to be
18 filed and served twenty-one days before the hearing date on the
19 motion, the continuance of the MTD hearing also continued
20 Plaintiffs' deadline to file their opposition. However, Plaintiffs
21 did not file an opposition by the new October 25, 2010 deadline,
22 nor have they since filed an opposition. Rather, on October 27,
23 2010, Plaintiffs filed an Amended Complaint and a Motion to Remand.
24 On November 9, 2010, Plaintiffs requested that the Court vacate the
25 upcoming hearing on Defendant's MTD, which Defendant opposed. ECF
26 Nos. 13 ("Pls.' Req. to Vacate Hearing"), 14 ("Opp'n to Pls.' Req.
27 to Vacate Hearing"). The Motion to Remand is now fully briefed.
28 ECF Nos. 16 ("Opp'n to Pls.' Mot."), 17 ("Pls.' Reply").

1 **III. DISCUSSION**

2 **A. Plaintiffs' Motion to Remand**

3 In their Motion to Remand, Plaintiffs challenge the removal of
4 the action from state court on procedural grounds. Pls.' Mot. at
5 2. Plaintiffs argue that under 28 U.S.C. § 1446(b), Defendant's
6 Notice of Removal should have been filed within thirty days of
7 service of the complaint. Id. Plaintiffs argue that because
8 Defendant was served with the original complaint on July 28, 2010,
9 § 1446(b)'s removal deadline was August 27, 2010, and thus the
10 Notice of Removal's August 30, 2010 filing was untimely. Id.

11 Defendant argues that Plaintiffs' Motion to Remand was itself
12 untimely filed under 28 U.S.C. § 1447(c), and thus Plaintiffs have
13 waived any non-jurisdictional challenge to Defendants' removal.
14 See Opp'n to Pls.' Mot. at 2. Section 1447(c) provides: "A motion
15 to remand the case on the basis of any defect other than lack of
16 subject matter jurisdiction must be made within 30 days after the
17 filing of notice of removal under section 1446(a)." 28 U.S.C. §
18 1447(c). The Motion to Remand was filed on October 27, 2010, more
19 than eight weeks after the August 30, 2010 Notice of Removal.

20 Plaintiffs claim that the parties agreed to toll the deadline
21 to file Plaintiffs' Motion to Remand for at least thirty days to
22 accommodate ongoing settlement negotiations. See Pls.' Req. to
23 Vacate Hearing at 2. Plaintiffs claim that this agreement was
24 memorialized in the September 13, 2010 Stipulation and Order. Id.
25 Defendant denies that any such agreement existed, and argues that
26 the Stipulation and Order is silent on the issue of tolling the
27 remand deadline. Opp'n to Pls.' Mot. at 3.

28 Having reviewed the Stipulation and Order, the Court agrees

1 with Defendant that it does not evince, or even imply, an agreement
2 between the parties to toll the remand deadline. As such, the
3 Court DENIES Plaintiffs' Motion to Remand as an untimely procedural
4 challenge to removal under 28 U.S.C. § 1447(c).

5 **B. Defendant's Motion to Dismiss**

6 Plaintiffs did not file an opposition or statement of non-
7 opposition to Defendant's MTD. Rather, they filed an Amended
8 Complaint on October 27, 2010. Plaintiffs argue that this filing
9 supersedes the original complaint, and thus Defendant's motion to
10 dismiss the original complaint should be denied as moot. See Pls.'
11 Req. to Vacate Hearing at 1-2.

12 Defendant argues that Plaintiffs' Amended Complaint was not
13 timely filed, and should be disregarded. Opp'n to Pls.' Req. to
14 Vacate Hearing at 2. Defendant argues that under Rule 15(a) of the
15 Federal Rules of Civil Procedure, a party may file an amended
16 complaint once without leave of the court if it is filed within
17 twenty-one days of service of a Rule 12(b) motion. Id. Defendant
18 argues that because Defendant's MTD was filed on September 3, 2010,
19 Rule 15(a)'s twenty-one-day window to amend the complaint closed on
20 September 24, 2010, and so the Amended Complaint -- filed on
21 October 27, 2010 -- is untimely. Id.

22 While Defendant asks the Court to strictly apply the Rule
23 15(a) twenty-one-day deadline, Rule 15(b) states: "The court should
24 freely give leave [to amend a pleading] when justice so requires."
25 Fed. R. Civ. P. 15(b). When served with a Rule 12(b) motion, a
26 plaintiff usually has a choice: file an opposition, a statement of
27 non-opposition, or, if an amended complaint has not yet been filed,
28 an amended complaint. Civil Local Rule 7-3(b) ordinarily gives a

1 plaintiff fourteen days to file an opposition, and Rule 15(a) gives
2 the plaintiff twenty-one days to file an amended complaint. The
3 parties sought a continuance of the hearing date to conduct
4 settlement negotiations. If the stipulation continuing the hearing
5 date were interpreted to extend Plaintiffs' deadline to file an
6 opposition but not the deadline to file an amended complaint,
7 Plaintiffs would be denied this choice.

8 However, even if the Court were to find that the September 13,
9 2010 Stipulation and Order tolled the Rule 15(a) deadline,
10 Plaintiffs' Amended Complaint would still be filed two days after
11 the new deadline. Despite the untimely filing of Plaintiffs'
12 Amended Complaint, the Court will accept its filing for practical
13 reasons. If the Court disregarded Plaintiffs' untimely amendment,
14 Defendant's MTD would be unopposed, and the Court would have two
15 options: grant Defendant's MTD and dismiss the action with
16 prejudice, or grant the MTD without prejudice and give Plaintiffs
17 leave to file an amended complaint. The first option would
18 conflict with this circuit's disfavor of default judgments. See In
19 re Hammer, 940 F.2d 524, 525-36 (9th Cir. 1991) (stating the
20 policy, in the context of Rule 60(b), of disfavoring default
21 judgments and favoring decisions on the merits). The second would
22 unnecessarily prolong proceedings and arrive at the same result as
23 accepting Plaintiffs' Amended Complaint as the operative complaint.
24 For these reasons, the Court accepts Plaintiffs' late-filed Amended
25 Complaint. Because this Amended Complaint supersedes the original
26 complaint, the Court DENIES Defendant's MTD as moot.

27 The Court cautions the parties that it will not tolerate
28 future missed deadlines or violations of court rules. It also

1 stresses to Plaintiffs that their untimely filing of both the
2 amended complaint and motion to remand has multiplied the
3 proceedings in this case at a cost to both Defendant and the Court.
4 A pattern of such behavior, if found by the Court to be
5 unreasonable and vexatious, is grounds for sanctions under 28
6 U.S.C. § 1927. Furthermore, future failures by Plaintiffs to
7 comply with this Court's rules may result in the dismissal of the
8 action pursuant to Rule 41(b).

9
10 **IV. CONCLUSION**

11 For the foregoing reasons, the Court DENIES Defendant Wachovia
12 Mortgage's Motion to Dismiss and DENIES Plaintiffs John and Julie
13 Shirley's Motion to Remand. Plaintiffs' Amended Complaint, filed
14 on October 27, 2010, supersedes the original complaint. Within
15 twenty-one (21) days of this Order, Defendant shall either file its
16 Answer or a Motion to Dismiss under Rule 12(b) of the Federal Rules
17 of Civil Procedure. The status conference scheduled for December
18 17, 2010 in Courtroom No. 1, 17th Floor, United States Courthouse,
19 450 Golden Gate Avenue, San Francisco, California, is continued to
20 January 21, 2011 at 10:00 a.m. Parties shall file a joint case
21 management statement seven (7) days prior to the hearing.

22
23 IT IS SO ORDERED.

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25 Dated: December 2, 2010

26 
UNITED STATES DISTRICT JUDGE